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Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property

24-28 February 2003

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Fifty-eighth Session
Supplement No. 22 (A/58/22)

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Note

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Contents

Chapter		*Paragraphs*	*Page*
I.	Introduction	1–7	1
II.	Proceedings	8–12	2
Annexes			
I.	Draft articles on jurisdictional immunities of States and their property		4
II.	Understandings with respect to certain provisions of the draft articles		14

Chapter I
Introduction

1. The Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, established by the General Assembly in its resolution 55/150 of 12 December 2000, was reconvened in accordance with paragraph 2 of General Assembly resolution 57/16 of 19 November 2002. The Ad Hoc Committee met at Headquarters from 24 to 28 February 2003.

2. In accordance with paragraph 3 of General Assembly resolution 55/150, the Ad Hoc Committee was open to all States Members of the United Nations and to States members of the specialized agencies.

3. The Chairman of the Ad Hoc Committee, Gerhard Hafner (Austria), opened the session.

4. At its 5th plenary meeting, on 24 February, the Ad Hoc Committee elected Manimuthu Gandhi (India) to replace Narinder Singh (India) and Ana Carlina Plazas (Colombia) to replace Guillermo Reyes (Colombia) on the Bureau. Thus, the Bureau was constituted as follows:

Chairman:
Gerhard Hafner (Austria)

Vice-Chairpersons:
Karim Medrek (Morocco)
Piotr Ogonowski (Poland)
Manimuthu Gandhi (India)

Rapporteur:
Ana Carlina Plazas (Colombia)

5. The Director of the Codification Division of the Office of Legal Affairs, Václav Mikulka, acted as Secretary of the Ad Hoc Committee. The Deputy Director of the Division, Mahnoush H. Arsanjani, acted as Deputy Secretary of the Ad Hoc Committee and Secretary to the Working Group of the Whole. The Codification Division provided the substantive services for the Ad Hoc Committee and the Working Group of the Whole and its working groups.

6. Also at its 5th plenary meeting, the Ad Hoc Committee adopted the following agenda (A/AC.262/L.3):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Making a final attempt at consolidating areas of agreement and resolving outstanding issues, with a view to elaborating a generally acceptable instrument based on the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission at its forty-third session, and also on the discussions of the open-ended working group of the Sixth Committee and the Ad Hoc Committee and their results, as well as to recommending a form for the instrument.
6. Adoption of the report.

7. The Ad Hoc Committee had before it its report on the 2002 session[1] and, for reference purposes, comments submitted by States in accordance with General Assembly resolution 49/61 of 9 December 1994 and on the reports of the open-ended working group of the Sixth Committee established under Assembly resolutions 53/98 of 8 December 1998 and 54/101 of 9 December 1999, as contained in the reports of the Secretary-General.[2] The Committee also had, for reference purposes, the 1999 and 2000 reports of the Chairman of the working group of the Sixth Committee;[3] the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission at its forty-third session in 1991;[4] and the comments and suggestions made by the Commission at its fifty-fourth session in 1999,[5] in accordance with Assembly resolution 53/98.

Chapter II
Proceedings

8. At its 5th plenary meeting, the Ad Hoc Committee adopted its organization of work and decided to proceed with its work in a Working Group of the Whole.

9. The Working Group proceeded with the substantive discussion of the outstanding issues and established two informal consultative groups. The first group, coordinated by Chusei Yamada (Japan), dealt with the criteria for determining the commercial character of a contract or transaction under paragraph 2 of article 2. The second group, coordinated by Michael Bliss (Australia), considered outstanding issues relating to the concept of a State enterprise or other entity in relation to commercial transactions under paragraph 3 of article 10, contracts of employment under paragraph 2 of article 11, the question of non-applicability of the draft articles to criminal proceedings, and their relationship with other agreements. Pending issues concerning articles 13, 14, 17, 18 and the form of the future instrument were considered by the Working Group of the Whole.

10. The Working Group of the Whole discussed and resolved all the outstanding issues.

11. At its 6th plenary meeting, on 28 February 2003, the Ad Hoc Committee adopted its report containing the text of the draft articles on jurisdictional immunities of States and their property (see annex I), together with understandings with regard to some of the provisions of the draft articles (see annex II).

12. At the same meeting, the Ad Hoc Committee decided to recommend that the General Assembly take a decision on the form of the draft articles. If and when the General Assembly decided to adopt the draft articles as a convention, the draft articles would need a preamble and final clauses, including a general saving provision concerning the relationship between the articles and other international agreements relating to the same subject.

Notes

[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 22* (A/57/22).

[2] A/52/294, A/53/274 and Add.1, A/54/266, A/55/298 and A/56/292 and Add.1 and 2.

[3] A/C.6/54/L.12 and A/C.6/55/L.12.

[4] *Yearbook of the International Law Commission, 1991*, vol. II (Part Two) (United Nations publication, Sales No. E.93.V.9 (Part 2)), document A/46/10, chap. II, para. 28.

[5] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* and corrigenda (A/54/10 and Corr.1 and 2), annex.

Annex I

Draft articles on jurisdictional immunities of States and their property

Part I
Introduction

Article 1
Scope of the present articles

The present articles apply to the immunity of a State and its property from the jurisdiction of the courts of another State.

Article 2
Use of terms

1. For the purpose of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(b) "State" means:

(i) The State and its various organs of government;

(ii) Constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of the sovereign authority, and are acting in that capacity;

(iii) Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) Representatives of the State acting in that capacity;

(c) "commercial transaction" means:

(i) Any commercial contract or transaction for the sale of goods or supply of services;

(ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which

may be given to them in other international instruments or in the internal law of any State.

Article 3
Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(a) Its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and

(b) Persons connected with them.

2. The present articles are without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

3. The present articles are without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.

Article 4
Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present articles for the States concerned.

Part II
General principles

Article 5
State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles.

Article 6
Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) Is named as a party to that proceeding; or

(b) Is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7
Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) By international agreement;

(b) In a written contract; or

(c) By a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8
Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) Itself instituted the proceeding; or

(b) Intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(a) Invoking immunity; or

(b) Asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Article 9
Counter-claims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

Part III
Proceedings in which State immunity cannot be invoked

Article 10
Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(a) In the case of a commercial transaction between States; or

(b) If the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

(a) Suing or being sued; and

(b) Acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,

is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 11
Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) The employee has been recruited to perform particular functions in the exercise of governmental authority;

(b) The employee is:

(i) A diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) A consular officer, as defined by the Vienna Convention on Consular Relations of 1963;

(iii) A member of diplomatic staff of permanent missions to international organizations, of special missions, or is recruited to represent a State at international conferences; or

(iv) Any other person enjoying diplomatic immunity;

(c) The subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) The subject of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) The employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

(f) The employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject matter of the proceeding.

Article 12
Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13
Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

(a) Any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

(b) Any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(c) Any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 14
Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) The determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) An alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Article 15
Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) Has participants other than States or international organizations; and

(b) Is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Article 16
Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.

3. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

5. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

6. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 17
Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) The validity, interpretation or application of the arbitration agreement;

(b) The arbitration procedure; or

(c) The confirmation or the setting aside of the award,

unless the arbitration agreement otherwise provides.

Part IV
State immunity from measures of constraint in connection with proceedings before a court

Article 18
State immunity from pre-judgement measures of constraint

No pre-judgement measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

Article 19
State immunity from post-judgement measures of constraint

No post-judgement measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) It has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgement measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 20
Effect of consent to jurisdiction to measures of constraint

Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Article 21
Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, paragraph (c):

(a) Property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) Property of a military character or used or intended for use in the performance of military functions;

(c) Property of the central bank or other monetary authority of the State;

(d) Property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) Property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

Part V
Miscellaneous provisions

Article 22
Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) In accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) In accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or

(c) In the absence of such a convention or special arrangement:

(i) By transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) By any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 23
Default judgement

1. A default judgement shall not be rendered against a State unless the court has found that:

(a) The requirements laid down in article 22, paragraphs 1 and 3, have been complied with;

(b) A period of not less than four months has expired from the date on which the service of the writ or other documents instituting a proceeding has been effected or deemed to have been effected in accordance with article 22, paragraphs 1 and 2; and

(c) The present articles do not preclude it from exercising jurisdiction.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in article 22, paragraph 1, and in accordance with the provisions of that paragraph.

3. The time limit for applying to have a default judgement set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned.

Article 24
Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State.

Annex II

Understandings with respect to certain provisions of the draft articles

With respect to article 10

The term "immunity" in article 10 is to be understood in the context of the draft articles as a whole.

Article 10, paragraph 3, does not pre-judge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to article 11

The reference in article 11, paragraph 2 (d), to the "security interests" of the employer State was intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

Under article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations, all persons referred to in those articles have the duty to respect the laws and regulations, including the respect of labour laws, of the host country. At the same time, under article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post.

With respect to articles 13 and 14

The expression "determination" is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

With respect to article 17

The expression "commercial transaction" includes investment matters.

With respect to article 19

The expression "entity" in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words "property that has a connection with the entity" in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not pre-judge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to criminal proceedings

There was the general understanding that the draft articles do not cover criminal proceedings.

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